ECORD
AND
RIEFS,

No. 16-6855

AUG 28 2017

In The
Supreme Court of the United States

MARION WILSON,

Petitioner,

v.

ERIC SELLERS, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE STATES OF ARKANSAS, ALABAMA, ARIZONA, FLORIDA, IDAHO, INDIANA, IOWA, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* STATES

This case calls upon the Court to protect and effectuate the values of federalism and comity enshrined in AEDPA and specifically in 28 U.S.C. § 2254(d). The Court's decision will have a significant impact on the scope of deference afforded to the states' highest courts on federal habeas review. The 25 *Amici* States have a keen interest in preserving AEDPA's commitment to constrained and limited federal habeas review.

INTRODUCTION AND SUMMARY OF ARGUMENT

Everyone involved in this case has spent a vast amount of time, energy, and brain power trying to claim the mantle of federalism and comity for his legal position. This is not a surprise, given the importance and centrality of these concepts to the AEDPA regime Congress created. *See Wilson v. Warden*, 834 F.3d 1227, 1260-61 (11th Cir. 2016) (*en banc*) (Pryor, Jill, J., dissenting) ("The majority and I agree that principles of federalism and comity should guide our analysis."). The 25 undersigned *Amici* States believe they are in a unique position to authoritatively address this debate. And the answer is easy. Whatever possible arguments there might be in favor of Petitioner's legal position, Respondent's position is the only one that accords with the values of federalism and comity. To suggest otherwise is to twist the concepts of federalism and comity beyond recognition.

In *Harrington v. Richter*, 562 U.S. 86 (2011), this Court unanimously[1] held that "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id.* at 98. In so doing, this Court analyzed § 2254(d) of AEDPA and concluded its language focused federal court review specifically on whether the ultimate "decision" of a claim was unreasonable in light of clearly established Supreme Court precedent. *See id.* at 98. The statutory focus on the "decision" of the claim as opposed to any written reasons supporting the decision is why the Court found § 2254(d) deference to apply even when federal courts could not determine the reasons that led to the relevant state court's decision. *Id.*[2]

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[1] Justice Ginsburg's concurrence in judgment did not disagree with the majority's opinion regarding the deferential standard to be applied in *Richter*. *See* 562 U.S. at 113-14. Justice Kagan did not take part in the decision.

[2] Petitioner's incredibly thin statutory interpretation argument, *see* Pet. Br. at 24-25, simply ignores *Richter*'s interpretation of § 2254(d). Specifically, Petitioner argues that § 2254(d) requires not a review of the reasonableness of the outcome of the state proceedings, but a review of the reasonableness of the analysis used to reach the outcome. If that were true, *Richter* could not have concluded that a written opinion was unnecessary to the application of § 2254(d). Petitioner's suggestion appears to be that the same words in the same statute can be interpreted differently in different situations and thus create "two divergent analytical modes – one when there is no previous reasoned decision below and another for when there is." *Wilson*, 834 F.3d at 1236. There is no support in law or logic for that position. Congress did not modify the phrase "adjudicat[ion] on the merits" to include only those

This Court was quite clear on what AEDPA requires where the reasons for the relevant state court's decision are not known. In such circumstances, "[u]nder § 2254(d), a habeas court must determine what arguments or theories . . . could have supported[] the state court's decision . . . and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.* at 102. This Court acknowledged the difficulty for a petitioner to meet this standard, but it concluded that difficulty was the very purpose of AEDPA. *See id.* ("If this standard is difficult to meet, that is because it was meant to be."). This Court explained that "Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id.* at 102-03 (internal quotation marks and citation omitted). That is why "a state prisoner must show that the state court's ruling on the claim

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decisions which were accompanied by reasons. In short, § 2254(d) requires deference to a state court "decision" as opposed to the reasoning underlying that decision. *Johnson v. Williams*, 568 U.S. 289, 310 (2013) (Scalia, J., concurring in judgment) ("For what is accorded deference is not the state court's reasoning but the state court's judgment, which is presumed to be supported by whatever valid support was available.").

being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

"The reasons for this approach are familiar." *Id.* As Justice Kennedy's opinion for the Court recounts, § 2254(d) "is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions" and "to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding. . . ." *Id.* Because federal habeas review "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority," the limits placed on that review by Congress are aggressively enforced by this Court. *Id.* (acknowledging that federal habeas review "frustrates . . . States' sovereign power to punish offenders[,]" frustrates States' "good-faith attempts to honor constitutional rights[,]" "disturbs the State's significant interest in repose for concluded litigation," and "denies society the right to punish some admitted offenders").

Today this Court is faced with a relatively straight-forward question: does the holding and statutory analysis set forth in *Richter*, *see id.* at 98-100, apply where (1) the last state court to deny habeas relief on the merits did so in a summary decision, but (2) a lower state court earlier denied relief with a written opinion? "Yes" is the only answer that accords States the comity and respect to which they are due under the

AEDPA statute. It is the only answer that properly cabins the exercise of federal court review as envisioned in AEDPA. And it is the only answer that does not perversely punish States that require their lower courts to issue reasoned decisions. A summary merits decision by a state appellate court can be for any reason and does not adopt the written opinion of the state trial court. Accordingly, no specific reasoning can properly be attributed to the last state court summary merits decision, and a federal court reviewing such a decision must apply *Richter*.

Petitioner seeks an end-run around *Richter* via imposition of a "presumption" that a state appellate court's summary merits decision adopts the specific reasoning in a lower court opinion. Nothing in the text of § 2254(d) requires, or even suggests, Congress intended for federal courts to make such a presumption. On the contrary, such a presumption would be inconsistent with *Richter*'s analysis of the plain text's focus on the "decision" of a claim. Moreover, it would thwart the purposes of § 2254(d) by artificially limiting the scope of deference given to a state court decision. Without the presumption, a state appellate court decision would be upheld so long as there was any basis for its decision that was not an unreasonable application of clearly established Supreme Court precedent. With the presumption on Petitioner's view, this deferential standard is confined only to the specific reasoning ascribed by the federal court to the state court's summary merits decision. *Amici* States can think of nothing more

corrosive to the idea of federalism and comity than allowing a federal court to avoid the broad deference in § 2254(d) by unilaterally recasting a state appellate court's summary decision as an affirmance and adoption of the opinion of a lower state court. If a state's law – code or caselaw – treats a summary merits decision as not adopting the lower court's specific opinion, federal courts should be required to honor that state law determination and proceed under *Richter*.

ARGUMENT

I. It is the Antithesis of Comity for Federal Courts to Presume the State Appellate Court's Reason for a Summary Merits Decision.

Congress intended federal courts to operate with a particular and heightened sensitivity to federalism and comity concerns in the habeas context. It is completely inconsistent with these values for a federal habeas court to ascribe its own meaning to a state appellate court's summary merits decision. Rather, federal courts should defer to state law in ascribing a particular meaning to a state appellate court's summary merits decision denying habeas relief. This is true even where a summary decision operates in practice as a summary affirmance of a lower court's decision. *Cf. Richter*, 562 U.S. at 100 ("As has been noted before, the California courts or Legislature can alter the State's practices or elaborate more fully on their

import. But that has not occurred here.") (internal citation omitted).[3] Where state law does not provide that a summary affirmance adopts the specific reasoning of a lower court, federal courts must not independently force such a stricture on a state.

This approach is the only one that is consistent with the central teaching of *Richter* – the primacy and centrality of the state habeas process. *See* 562 U.S. at 103. Petitioner's contrary approach – that the federal courts should on their own divine what a state appellate court's summary merits decision means – is only justified if one views the state habeas process as nothing more than the warm-up act for federal review. But *Richter* clearly rejected that view, emphasizing that the very purpose of § 2254(d) is to ensure that the state process is not treated as a "preliminary step for a later federal habeas proceeding." *Id.* Petitioner misses the point when he argues that federal review under § 2254(d) would be easier or better if only a particular

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[3] If a federal court is genuinely unclear as to how state law would treat a summary merits decision in terms of whether it *sub silentio* adopts a lower court's written reasons, it need only ask. Such a question is the model candidate for certification to the particular State's highest court. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997) (This Court may "put the [state-law] question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response."); *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) ("[T]he certification procedure . . . save[s] time, energy, and resources and helps build a cooperative judicial federalism."). Certification of such a question would be far more consistent with comity and federalism than would the federal court unilaterally imposing its best guess as to the meaning of a summary merits decision by a state appellate court.

line of reasoning could be ascribed to the state appellate court's summary affirmance. Perhaps. But the purpose of federal habeas review – at least post AEDPA – is not to grade the work done in the state habeas process. This is not a common core math test. A state appellate court need not show its work. And a federal court need not presume how the state court reached its decision to properly serve its extraordinarily limited function as an emergency backstop. *See id.* (Federal habeas review is limited to guarding against "extreme malfunctions in the state criminal justice systems" that result in a "ruling on the claim . . . so lacking in justification" under existing law as to be "beyond any possibility for fairminded disagreement.").

Amici States do not wish to belabor the commonsense and intuitive point that federalism and comity are seriously harmed where a federal court – contrary to what state law would hold – treats a state appellate court's summary merits decision as the *sub silentio* adoption of the specific reasoning of a lower court. But in the habeas context, where deference to state court adjudication is statutorily at its zenith, three quick points bear highlighting.

First, federal courts treat summary affirmances by federal appellate courts as not adopting the reasoning of a lower court's opinion. *See Wilson*, 834 F.3d at 1236-37. Indeed, both this Court and federal appellate courts across the country have emphatically enforced this doctrine. *See, e.g.*, *id.* There is no principled reason for being less deferential to state appellate courts as a general matter. But doing so in the habeas context –

where the federal court system is intentionally relegated by statute to a limited, secondary, and highly deferential role – is an even greater affront to the dignity of our states' court systems.

Second, presuming a particular line of reasoning from a summary merits decision – even one that operates in practice as a summary affirmance – stands in direct contravention to the very *zeitgeist* of AEDPA. "AEDPA's requirements reflect a 'presumption that state courts know and follow the law.'" *See Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)).[4] But Petitioner's approach would – where it counts – assume state appellate courts either did not know or did not follow the law. For example, posit an ineffective assistance of counsel claim where the state trial court denies habeas relief and issues a written opinion only analyzing the deficient conduct prong. The state appellate court then summarily denies the habeas claim. The reviewing federal court concludes that it would be a completely unreasonable application of *Strickland*'s first prong to find counsel's conduct constitutionally

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[4] This proposition was an important part of the push to pass AEDPA. Proponents of AEDPA explained it was "unfair to assume [] that a State judge is going to be less sensitive to the law, less scholarly in his or her decision than a Federal judge." 142 Cong. Rec. H3599-01, H3604 (Rep. Hyde) (Apr. 18, 1996). Representative Hyde even explained that "the State judge went to the same law school, studied the same law and passed the same bar exam that the Federal judge did" and swore to defend the same U.S. Constitution. 142 Cong. Rec. H3599-01, H3604 (Rep. Hyde) (Apr. 18, 1996).

sufficient, but that reasonable jurists could disagree as to the proper application of the prejudice prong in the case. Petitioner's proposed approach would assume that the state appellate court made an egregious mistake of constitutional law and based its ruling on an analysis which no reasonable judge could have made. Respondent's proposed approach, on the other hand, would leave room for the possibility that the state appellate court did not make an egregious and unreasonable constitutional mistake, but rather denied habeas relief on a ground that was reasonable under current law. It is not difficult to tell which position is respectful of our States.

This is not an academic or theoretical dispute. Under Petitioner's approach, the federal court would make a *de novo* decision on the prejudice prong even as it acknowledged that reasonable judges could have denied relief on this ground. Under Respondent's approach, the federal court would defer to the state appellate court's denial of relief because that denial was not an unreasonable resolution of the claim. Allowing a federal judge to ascribe a particular line of reasoning to a state appellate court's summary affirmance and then only afford deference to that narrow line of reasoning undercuts the purposeful limitations on aggressive federal review enshrined in § 2254(d).

Third, Petitioner's approach would amount to federal court imposition of an opinion-writing requirement on state appellate courts. As *Amici* States understand Petitioner's argument, the federal court

should look at the lower state court's reasoned decision in all cases unless the state appellate court writes its own reasoned decision. That, of course, would be the quintessential opinion-writing requirement rejected by this Court. *See Wilson*, 834 F.3d at 1238. Perhaps because of this, the dissent below took a different tack; it argued that a state appellate court could prevent federal habeas review of a lower court's reasoned decision by adding a "form" sentence to its summary opinions signifying agreement with the lower court's result but not reasoning. *See id.* at 1264 (Pryor, Jill, J., dissenting).

It is unclear whether Petitioner agrees with the dissent below that a form sentence would be enough to place the case within the confines of *Richter*. It is also unclear whether the dissent envisioned a form sentence that could be placed on every summary merits decision simply saying such decision "does not necessarily affirm the reasoning of the court below." Or would the form sentence have to affirmatively intimate that in a specific case the state appellate court did not agree with the reasoning from the lower court? In either case, it is demeaning to require a state appellate court to make such a specific statement as a condition of receiving the deference and comity which it is already owed.

Either the state appellate court is being required to continuously regurgitate state law on the effect of a summary merits decision or the state appellate court is being required to affirmatively identify when it disagrees with a lower court opinion. The former is silly

and infantilizing. The latter forces a state appellate court to say something about a lower court's reasoning when the appellate court might not want to do so. For example – to continue with the *Strickland* hypotheticals – assume a state lower court denied habeas relief, and its opinion analyzed only the first prong of *Strickland*. Further assume the state appellate court believes on first glance that the first prong of *Strickland* may be a close call, but the lack of prejudice is exceedingly clear and a far easier basis on which to deny relief. The state appellate court in such a situation might well deny habeas relief without seriously analyzing the first prong. And in such a situation, the state appellate court may well have good reason not to say or imply anything – good or bad – about the lower court's analysis of the first prong. Coercing state courts to act otherwise as a condition of federal deference is inconsistent with *Richter*'s warning that "requiring a statement of reasons could undercut state practices designed to preserve the integrity of the case-law tradition." 562 U.S. at 99.

II. It Cannot be Seriously Suggested that Comity is Advanced by a Federal Court Presuming What a State Court's Summary Merits Decision Means.

Like the dissent below, Petitioner attempts to use specific attributes of the Georgia habeas process to justify a federal court's presumption of the grounds for the Georgia Supreme Court's summary merits decision. Indeed, Petitioner and the dissent below go so far

as to imply that use of the presumption is the only way to effectuate the values of federalism and comity. *See* Pet. Br. at 42; *Wilson*, 834 F.3d at 1255 (Pryor, Jill, J., dissenting). Their topsy-turvy logic appears to be: (1) the specifics of Georgia's state habeas process makes it more likely than not that a summary merits decision by the Georgia Supreme Court adopts the reasoning of the lower state court; and (2) the presumption ensures that the federal court does not ignore the way that a state has set up its habeas system and does not ignore what is the most likely reasoning of the state appellate court. There are two serious flaws in such logic.

First, nothing about Georgia's habeas process dictates that summary merits decisions must be or are always based on the lower court's written reasoning. That Georgia has designed a system that requires a reasoned decision from the trial court does not provide significant insight; it tells us nothing more than that Georgia believed written fact-finding and analysis from the state lower court would in at least some cases help the state appellate courts review the decision of the lower court. That the Georgia Supreme Court would apply a clearly erroneous standard *if* reviewing factual/credibility findings does not mean the Georgia Supreme Court is constrained to denying habeas relief only for the specific reasons identified in a lower court's written opinion. And that the Georgia Supreme Court's initial review is to determine arguable merit of a petitioner's claim does not somehow preclude use of reasoning different from the lower court's written opinion to make this determination.

Many States, like Georgia, have vested trial courts with the *initial* responsibility of adjudicating collateral claims.[5] But in these States, trial courts are often not

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[5] *See* Ariz. R. Crim. P. 32.4(a) ("A proceeding is commenced by timely filing a notice of post-conviction relief with the court in which the conviction occurred."); Ark. R. Crim. P. 37.1(a) (Any prisoner seeking post-conviction relief "may file a petition in the court that imposed the sentence."); Del. Super. Ct. Crim. R. 61(d) ("A first postconviction motion shall be presented promptly to the judge who . . . presided at trial in the proceedings leading to the judgment under attack."); Haw. R. Penal P. 40(b) ("A proceeding for post-conviction relief shall be instituted by filing a petition with the clerk of the court in which the conviction took place."); Idaho Code Ann. § 19-4902 (A post-conviction "proceeding is commenced by filing an application verified by the applicant with the clerk of the district court in which the conviction took place."); La. C.Cr.P. art. 926(A) ("An application for post conviction relief shall be by written petition addressed to the district court for the parish in which the petitioner was convicted."); MCR 6.504(A) ("The motion [for post-conviction relief] shall be presented to the judge to whom the case was assigned at the time of the defendant's conviction."); Nev. Rev. Stat. 34.738 ("A petition that challenges the validity of a conviction or sentence must be filed with the clerk of the district court for the county in which the conviction occurred."); N.J. Ct. R. 3:22-1 (A petitioner may file a petition for post-conviction relief "with the criminal division manager's office of the county in which the conviction took place."); NMRA, R. 5-802(E)(1) (A petition for post-conviction relief "shall be filed in the county of the court in which the matter was adjudicated."); N.C. Gen. Stat. Ann. § 15A-1413(b) ("The judge who presided at the trial is empowered to act upon a motion for appropriate relief."); Ohio Rev. Code Ann. § 2953.21(A)(1)(a) (A petitioner "may file a petition in the court that imposed sentence."); Okla. Stat. Ann. tit. 22, § 1080 (A petitioner must initiate the proceeding "in the court in which the judgment and sentence on conviction was imposed."); Or. Rev. Stat. 138.560(1) (A petition may be filed "with the clerk of the circuit court for the county in which the petitioner is imprisoned."); Tenn. Code Ann. § 40-30-104(a) (A petition must be

the final merits adjudicators of claims. They are simply the *initial* ones. These States, like Georgia, have crafted habeas systems that – depending on the circumstances of the case – provide a petitioner with a second merits decision after a state trial court has initially denied his claim.[6] It is this second (or in some

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filed "with the clerk of the court in which the conviction occurred."); Tex. Crim. P. Code art. 11.07, § 3(d) (For non-capital cases, petitions "must be filed with the clerk of the court in which the conviction being challenged was obtained."); Utah Code Ann. § 78B-9-104(1) (A petition must be filed "in the district court of original jurisdiction for post-conviction relief."); Wyo. Stat. Ann. § 7-14-101(b) (A petition must be filed "with the clerk of the court where the conviction occurred.").

[6] *See* Ark. R. App. P. – Crim. 2(a) (A petitioner must file a notice of appeal within 30 days of "the date of entry of an order denying a petition for postconviction relief under Ark. R. Crim. P. 37."); Colo. R. Crim. P. 35(c)(3)(IX) ("The order of the trial court granting or denying the [post-conviction] motion is a final order reviewable on appeal."); Del. Super. Ct. R. 6(a)(iv) (A notice of appeal must be filed "[w]ithin 30 days after entry upon the docket of a judgment or order in any proceeding for post-conviction relief."); Haw. R. Penal P. 40(h) ("Any party may appeal from a judgment entered in the proceeding in accordance with Rule 4(b) of the Hawai'i Rules of Appellate Procedure."); Idaho Code Ann. § 19-4909 (A final judgment is appealable if a petitioner files a notice of appeal "within forty-two (42) days from the entry of the judgment."); Nev. Rev. Stat. 34.575(1) (A petitioner, "whose application for the [post-conviction relief] is denied, may appeal to the appellate court of competent jurisdiction."); N.J. Ct. R. 2:2-3 ("[A]ppeals may be taken to the Appellate Division as of right."); Ohio Rev. Code Ann. § 2953.02 ("[T]he judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals."); Okla. Stat. Ann. tit. 22, § 1087 ("A final judgment entered under this act may be appealed to the Court of Criminal Appeals on petition in error filed either by the applicant or the state within thirty (30) days from the entry of the judgment."); Or.

states third) and final merits review – not the first one – that is due federal deference under § 2254(d). By structuring their systems this way, States have guaranteed that their appellate court decisions, whether or not accompanied by a written explanation, would be afforded deference. *See Greene v. Fisher*, 565 U.S. 34, 40 (2011) (Under AEDPA, the "last state-court adjudication on the merits" is afforded deference.). But, if Petitioner had his way, in all of these States, the federal court would essentially ignore the highest level of state court review of a habeas claim.

Not all States' collateral review systems are structured the same way as Georgia's. Other States have successfully crafted habeas systems that only provide for discretionary appellate review following the trial courts' denials.[7] In those States, where discretionary review is denied, that denial is not a merits decision.

Rev. Stat. 138.650(1) (A petitioner "may appeal to the Court of Appeals within 30 days after the entry of a judgment on a petition."); Tenn. Code Ann. § 16-5-108(a)(2) (A final judgment of a trial court in a post-conviction proceeding is appealable to "the court of criminal appeals."); Tex. Crim. P. Code art. 11.07, § 5 (For non-capital cases, "[t]he Court of Criminal Appeals may deny relief upon the findings and conclusions of the hearing judge without docketing the cause, or may direct that the cause be docketed and heard as though originally presented to said court or as an appeal.").

[7] *See* La. C.Cr.P. art. 930.6(A) ("The petitioner may invoke the supervisory jurisdiction of the court of appeal" by seeking a discretionary writ because "[n]o appeal lies from a judgment dismissing an application" for post-conviction relief.); NMRA, R. 5-802(L)(2) ("[I]f the writ is denied, a petition for certiorari may be filed with the Supreme Court."); N.C. Gen. Stat. Ann. § 15A-1422(c)(3) (A petitioner may seek review from the denial of his motion for appropriate relief "by writ of certiorari.").

Therefore, the only adjudication on the merits of a petitioner's claim is in the trial court. Because the trial court is the "last state court adjudication," its decision is afforded deference upon federal habeas review.

Even in States that offer a merits appellate review, a State could, if it wanted to, easily require the lower court's reasoning to be ascribed to a later summary merits decision by a state high court. Such a State could create a procedure in which a state appellate court must issue a written statement if it disagrees with the lower court's reasoned opinion. And state law could make clear that in absence of such a decision, the higher state court would be deemed to have adopted the lower state court's reasons.

If a State intended that a trial court's decision be given § 2254 deference, then it could have created a system that expressly effectuated that goal – leaving no room for guesswork as to later summary appellate decisions. In Georgia, however, an appellate court's summary merits decision is (in circumstances such as this case) the last state court adjudication on the merits. And Georgia does not require a written opinion when the summary merits decision is based on grounds different from the lower state court opinion. Petitioner's presumption would require federal courts to ignore Georgia's appellate review process by bypassing the "last state court adjudication" to afford deference to the "last [reasoned] state court adjudication." Such action goes against any and all notions of comity and "does nothing [but] offend[s]" Georgia's state habeas review process. *See* Pet. Br. at 42.

Second, if Respondent's approach is adopted and *Richter* is applied, there is no danger of "ignoring" the state trial court's written opinion. The federal court's review for the reasonableness of the arguments or theories that "could have supported" the state appellate court's summary merits decision will by definition include the arguments or theories actually espoused by the lower state court. Indeed, as a practical matter, the arguments or theories in the lower state court opinion are likely to be the first arguments or theories analyzed by the federal court for reasonableness. There is no threat to federalism or comity from the fact that the federal court will also apply a deferential standard to other theories and arguments that could have supported the appellate court's summary decision. As made clear in *Richter*, the true threat to federalism and comity comes from federal courts (1) reviewing habeas petitions without deference to state courts; and (2) granting the writ of habeas corpus where a State convicted a prisoner, the conviction was upheld on appeal, and the State denied habeas relief on reasonable grounds. Those concerns are simply not implicated where the federal court denies habeas relief, especially where the denial is based on affording a broad conception of deference to state habeas denials.

III. Petitioner's Approach Fails to Provide a Workable Standard for Determining When to Presume the Meaning of a Summary Merits Decision.

Aside from federalism and comity concerns – or perhaps reinforcing those concerns – Petitioner's argument suffers from a host of pragmatic concerns. Chief among these concerns is a lack of a workable standard for when federal courts should apply the presumption that a summary merits decision by a state appellate court has adopted the specific written analysis of a lower state court. Petitioner and the dissent below provide an overlapping – but not co-extensive – amalgam of attributes specific to the Georgia habeas system that they believe make a presumption appropriate for Georgia Supreme Court summary merits decisions. But neither Petitioner nor the dissent below suggests a test that federal courts can uniformly employ to determine if a particular state court habeas system makes a presumption appropriate. Instead, it appears Petitioner and the dissent below advocate for a standardless and malleable totality-of-the-circumstances analysis to determine whether a particular state habeas system counsels in favor or against the presumption. This is especially concerning because even state habeas systems that are generally similar often present *sui generis* variations that arguably could alter the analysis of the propriety of a presumption.[8] Giving a federal judge

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[8] Such a standardless, totality-of-the-circumstances test would be difficult to apply where a state's statutory requirements and actual practices are not perfectly aligned. For example, a

what amounts to unfettered power to artificially narrow the deference he or she must afford a state appellate court is precisely what AEDPA and § 2254(d) were trying to avoid.[9] Moreover, it will likely lead to significantly disparate treatment for states with generally similar habeas processes.

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state may require trial courts to give reasoned opinions when denying post-conviction relief. Yet the trial courts may not always provide reasons. *See Anthony v. Arkansas*, 2014 Ark. 195, at 2-3 (The trial court did not make adequate findings of fact and conclusions of law as required under Ark. R. Crim. P. 37.3(a), yet the Arkansas Supreme Court affirmed "based on the determination that these claims [were] wholly without merit."). Or the opposite is also true. A state's procedures may permit a trial court to issue a summary denial, but the trial courts in practice may issue reasoned opinions. *See Tex S. v. Pszczolkowski*, 778 S.E.2d 694, 701 (W. Va. 2015) (Although W. Va. Code Ann. § 53-4A-7(a) allows the trial court to summarily deny a petition, the trial court below "issued a twenty-eight page order denying" habeas relief.); *Winward v. Utah*, 355 P.3d 1022, 1024 (Utah 2015) (Under Utah R. Civ. P. 65C(o)(1), a trial court is only required to enter findings of fact and conclusions of law when it grants a petitioner post-conviction relief. Here, the court affirmed the denial of post-conviction relief on the reasoning the trial court provided in its ruling.).

[9] AEDPA demands that state court decisions be treated with "the utmost care." *See Williams v. Taylor*, 529 U.S. 362, 386 (2000) (Stevens, J., concurring). Indeed, AEDPA intentionally "place[d] a new constraint" on the power of a federal habeas court to grant habeas corpus relief. *Id.* at 412. In enacting § 2254(d)(1), Congress sought to curtail the aggressive intervention of the federal judiciary and to "end[] the improper review of the State court decisions." 141 Cong. Rec. S7803-01, S7846 (Sen. Hatch) (June 7, 1995). Congress understood that to streamline habeas corpus review a change from the "current practice of independent review" was needed. 141 Cong. Rec. S7803-01, S7840-42 (Sen. Biden) (June 7, 1995). Congress voted to eliminate federal courts "virtual *de novo*

Petitioner's approach also invites a multiplication of side-issues in federal habeas cases – first as to whether a presumption should apply to a state appellate court's summary merits decision and then whether there is enough information to overcome the presumption. States would be required to present evidence to the federal court on its policies, procedures, and practices to show that a summary merits decision is not an implicit adoption of a lower court's reasoning. *See Wilson*, 834 F.3d at 1261 (Pryor, Jill, J., dissenting) (stating that "Georgia's statutory procedures as well as the Georgia Supreme Court's practices support the conclusion that the Georgia Supreme Court's silent denial of an application for a certificate of probable cause indicates agreement with and adoption of the superior court's reasoning"). If this Court applies the presumption as Petitioner proposes, then a State in federal habeas review would bear the burden of refuting the presumption. *See id.* at 1247 (The presumption lies "absent strong evidence to rebut" it.). This would lengthen federal habeas review and force a State to expend additional time, money, and resources attempting to ensure its decision was afforded due deference, all of which is completely inconsistent with AEDPA's purpose of streamlining habeas review and promoting finality in state court convictions.

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review of a State court's legal determination." 141 Cong. Rec. S7803-01, S7846 (Sen. Hatch) (June 7, 1995). And instead, Congress enacted the "extraordinary deferential standard" in § 2254(d)(1). 141 Cong. Rec. S7803-01, S7842 (Sen. Biden) (June 7, 1995).

Finally, Petitioner's approach is the judicial equivalent of the old adage that "no good deed goes unpunished." States that offer only one merits determination and do not require written opinions would get the full scope of *Richter* deference – deference on all arguments or theories that could have supported the decision. The same full deference would be afforded to states with two (or more) levels of merits review if both (or all) levels decide the case without a written opinion. But where a State requires its lower state court to issue written opinions and the state appellate court(s) later denies the habeas claim without a written opinion, the scope of deference to the last state court merits decision would be significantly narrowed. If one is of the perspective that it is of a general benefit to the administration of justice to have a lower state court issue a written opinion, penalizing the State for this by reducing the available AEDPA deference would certainly seem to send the wrong signal and provide the wrong incentives.

CONCLUSION

For the foregoing reasons, this Court should conclude that *Richter* applies where the last merits adjudication in state court was a summary decision, regardless of whether or not a lower state court opinion exists.

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